

No. DA 09-0548

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD KNOX,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Katherine R. Curtis, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
EILEEN A. LARKIN
Assistant Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ED CORRIGAN
Flathead County Attorney
Justice Center
P.O. Box 1516
Kalispell, MT 59903-1516

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE AND FACTS.....	1
STANDARD OF REVIEW	6
ARGUMENT	6
I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM DEFENDANT-APPELLANT’S APPEAL IN ACCORD WITH <i>ANDERS V. CALIFORNIA</i>	6
II. THE RECORD MIGHT ARGUABLY SUPPORT APPELLANT’S ASSERTION THAT HE WAS SUBJECTED TO DOUBLE JEOPARDY	8
III. THE RECORD MIGHT ARGUABLY SUPPORT APPELLANT’S CONTENTION THAT HE WAS DENIED CREDIT AGAINST HIS SENTENCE FOR TIME ON PAROLE	8
CONCLUSION	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE.....	11
APPENDIX	12

TABLE OF AUTHORITIES

CASES

Anders v. California, 386 U.S. 738 (1967)	1, 6, 7
McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429 (1988)	7
State v. Haagenson, 2010 MT 95, 356 Mont. 177, __ P.3d __	6, 8
State v. Hornstein, 2010 MT 75, 356 Mont. 14, 229 P.3d 1206	9
State v. Knox, 2001 MT 232, 307 Mont. 1, 36 P.3d 383	2
State v. Martinez, 2008 MT 233, 344 Mont. 394, 188 P.3d 1034	6

OTHER AUTHORITY

<u>Montana Administrative Rules</u> Rule 20.25.202(3)	9
--	---

STATEMENT OF THE ISSUE

Whether the undersigned counsel should be permitted to withdraw from Defendant-Appellant's appeal in accord with the criteria established by the United States Supreme Court in *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF THE CASE AND FACTS

On August 11, 1998, Defendant-Appellant Richard Knox (Mr. Knox) was charged with Sexual Intercourse Without Consent. He was arraigned on October 1, 1998 and pled not guilty. (D.C. Docs. 2, 4.) Upon the State's motion, an Amended Information was filed on March 25, 1999, charging Mr. Knox with two counts of Sexual Assault. (D.C. Doc. 68.) Pursuant to a plea agreement, Mr. Knox pled guilty to one count of Sexual Assault on May 24, 1999. (D.C. Doc 84.) He was sentenced to forty (40) years in the Montana State Prison (MSP), with eighteen (18) years suspended. (D.C. Doc. 99; App. A.) Mr. Knox was subject to a parole restriction requiring him to satisfactorily participate in all of MSP's sexual offender and chemical dependency treatment programs. Mr. Knox was not required to complete all phases of these programs to become eligible for parole. He was required to "take[] advantage" of these programs and to progress "as far as reasonably can be expected." (D.C. Doc. 99 at 2.)

Mr. Knox subsequently sought to withdraw his guilty plea. The district court denied his motion. Mr. Knox appealed. The district court was affirmed. *See State v. Knox*, 2001 MT 232, 307 Mont. 1, 36 P.3d 383.

On March 31, 2009, the Board of Pardons and Parole (BOPP) revoked Mr. Knox's parole "[i]n accordance with Sections 46-23-1023 – 46-23-1025 MCA." (App. A.) The BOPP's parole revocation was based on Mr. Knox's violations of Condition E (failure to report), Condition I (comply with all laws), Special Condition 11 (no contact with females under the age of 18), and Condition 14 (no employment or recreation involving supervision of children. (App. B.)

On May 13, 2009, the State filed a Petition for Revocation of Suspended Sentence based upon the same conduct that resulted in the revocation of Mr. Knox's parole. (D.C. Docs. 131, 132; 8/17/2009 Tr. (Tr.) at 4.) At the time the State filed its petition, the suspended portion of Mr. Knox's sentence had not started to run. (Tr. at 17.) Mr. Knox was represented by counsel during the initial hearing on June 22, 2009, at which time he entered denials to the State's allegations. (6/22/09 Tr. at 3-4.) Mr. Knox understood that counsel had denied the allegations on his behalf and requested a contested hearing. (6/22/09 Tr. at 5.) A hearing was set for a later date. (6/22/09 Tr. at 4-5.)

On August 17, 2009, counsel for Mr. Knox informed the district court that Mr. Knox had entered into a Stipulation with the State regarding the allegations

contained in the underlying Report of Violation dated February 6, 2009. Counsel represented that Mr. Knox had failed to report on May 6, 2008, as scheduled and that he had contact with a five-year-old female child. The State dropped an allegation that Mr. Knox had unlawfully driven on grass. (Tr. at 4.) The Stipulation included a recommended disposition of eighteen (18) years in the Montana State Prison (MSP) with nine (9) years suspended. (Tr. at 5.) Mr. Knox informed the court he understood his counsel's representations and that he agreed. (Tr. at 5.)

Mr. Knox was sworn and examined by the court. Mr. Knox had a "clear head," understood the proceedings, and had not consumed alcohol or drugs within the past twenty-four hours. (Tr. at 8-9.) Mr. Knox testified that he had received the Report of Violation dated February 6, 2009, and that he had time to review it and discuss it with counsel. (Tr. at 6.) Mr. Knox stated he understood he had the right to remain silent and to make the State prove the allegations. Mr. Knox understood that if he admitted the violations, he was giving up those rights. Mr. Knox answered affirmatively that he did not want to call witnesses or cross-examine witnesses for the State, and that he wanted to tell the court what he did. (Tr. at 7.)

On August 17, 2009, Mr. Knox stated he was satisfied with counsel's representation. (Tr. at 7.) Mr. Knox had time to consult with counsel, and that his counsel had provided "good advice." (Tr. at 8.)

Mr. Knox understood his admissions to the allegations could result in eighteen (18) years at MSP, that the court was not bound by the agreed disposition, and that he might not receive credit for any time that might have elapsed on his probationary sentence. (Tr. at 8.)

Mr. Knox admitted he failed to report to his probation officer on May 6, 2008 as directed. (Tr. at 9.) He believed the appointment was scheduled for May 8, 2008 and showed on that day instead. (Tr. at 11.)

Mr. Knox admitted that on January 30, 2009, he told Missoula police officers that he had contact with a five-year-old female named A. He admitted he babysat A. on January 30, 2009, and was in a position of power or authority over her. (Tr. at 10.) Mr. Knox testified he was in a relationship with A.'s mother and that on January 30, 2009, he stayed with A. between the time her mother left for work and the time the babysitter arrived. (Tr. at 11.) Mr. Knox acknowledged the time he spent alone with A. was a violation of special conditions 11 and 14. (Tr. at 11-12.)

Upon further inquiry from the court, Mr. Knox admitted "there was some manipulation and untruthfulness" on his part when he told his probation officer he

had terminated his relationship with A.'s mother when she had actually moved next door. (Tr. at 12.) Mr. Knox explained he "hoped that I could get it worked out" by requesting a modification in his Judgment. (Tr. at 13.)

I thought I had permission, and I was proceeding with the court trying to get my judgment modified, and then I - - as it went along she notified me that it was not possible. And I tried - - I thought I was going to terminate the relationship, and she did end up moving next door, correct, and we did continue to see each other.

(Tr. at 13.)

Mr. Knox's counsel further clarified that "there was miscommunication between [Mr. Knox] and his probation officer about him living with A.'s mother, and he [Mr. Knox] had gotten a recommendation from his counselor that that would be all right." (Tr. at 16.)

After stating that Mr. Knox had not yet started serving the suspended portion of his sentence, counsel informed the court that Mr. Knox "wants to reserve his right to appeal the double jeopardy/double punishment issue." (Tr. at 17.)

As I understand it there are some cases working their way through the Supreme Court system, and if they are - - if those people are successful then Mr. Knox would like to apply under that decision, and he doesn't want to be barred because he didn't bring it up at this stage.

(Tr. at 17.)

The district court found that Mr. Knox was not under a disability, his admissions were freely and voluntarily given, had a basis in fact, and were not the result of promises, threats or coercion. (Tr. at 18.) The district court found Mr.

Knox had violated the conditions of his suspended sentence [which he had not yet begun to serve], revoked it, and reimposed the eighteen (18) year sentence to MSP with nine (9) years suspended subject to the conditions originally imposed. (Tr. at 18-19; D.C. Doc. 144.1; App. C.)

Mr. Knox appealed. The deadline for filing Mr. Knox's opening brief was extended to await the *Haagenson* decision that was pending before this Court.

STANDARD OF REVIEW

The issue of whether a district court has acted within its statutory authority in revoking a suspended sentence is question of law subject to plenary review. *State v. Haagenson*, 2010 MT 95, ¶ 9, 356 Mont. 177, ___ P.3d ___, citing *State v. Martinez*, 2008 MT 233, ¶ 16, 344 Mont. 394, 188 P.3d 1034. This Court exercises plenary review over questions of constitutional law. *Haagenson*, ¶ 9, citing *Martinez*, ¶ 16

ARGUMENT

I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM DEFENDANT-APPELLANT'S APPEAL IN ACCORD WITH *ANDERS v. CALIFORNIA*.

In *Anders*, the United States Supreme Court concluded that when counsel on appeal finds the case to be wholly frivolous after a conscientious examination, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744. The request to withdraw must be "accompanied by a brief referring to anything in

the record that might arguably support the appeal.” *Anders*, 386 U.S. at 744. This brief addresses those potential matters.

However, in making such a presentation, appellate defenders have an inherent dilemma between their duty to advocate for their indigent client, and the obligation of their oath and the rules of procedure and ethics that prohibit them from making non-meritorious claims. The United States Supreme Court addressed this dilemma as follows:

We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney’s conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with ‘notice’ that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.

McCoy v. Court of Appeals of Wisconsin, District I, 486 U.S. 429, 440 (1988).

Thus, the appellate defender must walk that fine line between advocacy and diligence wherein thorough research is the undoing of her client’s appeal. Here, the undersigned is compelled by her duty of candor before the Court in accord with *Anders* to provide this Court with notice that diligent research has yielded just such a result. No non-frivolous issues are present in this appeal.

II. THE RECORD MIGHT ARGUABLY SUPPORT APPELLANT'S ASSERTION THAT HE WAS SUBJECTED TO DOUBLE JEOPARDY.

Acting on Mr. Knox's behalf at the revocation hearing before the district court, counsel preserved the issue of whether it was double jeopardy and/or double punishment to rely upon the same conduct to revoke both parole and a suspended sentence that was not yet being served. (Tr. at 17.) This Court recently held:

[A] revocation of parole or probation does not constitute a punishment for double jeopardy purposes under the Fifth Amendment or Article II, Section 25. Rather it is a supervisory act involving the enforcement of conditions imposed on a term of parole or probation.

Haagenson, ¶ 17 (citations omitted).

The law now states that “the same act or acts may form the basis for revoking both an offender's parole and his ensuing suspended sentence, without contravening the Double Jeopardy Clauses.” *Haagenson*, ¶ 17.

III. THE RECORD MIGHT ARGUABLY SUPPORT APPELLANT'S CONTENTION THAT HE WAS DENIED CREDIT AGAINST HIS SENTENCE FOR TIME ON PAROLE.

Mr. Knox has contended that he did not receive credit for the time he was on parole. Mr. Knox's concern was based on a copy of a document titled “Case Disposition-Revocation” that he received from the Board of Pardons and Parole (BOPP). There is check in the box next to “none” under “Dead Time.” (App. B.)

“‘Dead time’ means the time from the issuance of a parole violation warrant to the date a violator is arrested on that warrant, or the time a parole violator serves

in a correction facility for a separate felony offense committed on parole.” Mont. Admin. R. 20.25.202(3). Parole time that is not counted as “dead time” allows that time to be credited against a sentence. *See State v. Hornstein*, 2010 MT 75, ¶ 16, 356 Mont. 14, 229 P.3d 1206. The BOPP’s “determination about ‘dead time’ on parole is an administrative matter within its broad discretion.” *Hornstein*, ¶ 16, *citing* Mont. Admin. R. 20.25.202(3).

The BOPP has determined Mr. Knox has no dead time on parole.

CONCLUSION

Conscientious examination of the record, along with thorough research seems to compel a conclusion that Mr. Knox’s appeal has no merit. This Court should grant the undersigned’s motion to withdraw as counsel on direct appeal. If the Court determines there are issues warranting an appeal brief, counsel requests the Court set them out in its Order and allow undersigned counsel to remain in the case and to proceed with briefing.

Respectfully submitted this ____ day of June, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

By: _____
EILEEN A. LARKIN
Assistant Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief
of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ED CORRIGAN
Flathead County Attorney
Justice Center
P.O. Box 1516
Kalispell, MT 59903-1516

RICHARD KNOX 45591
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

DATED: _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

EILEEN A. LARKIN

APPENDIX

Judgment and SentenceApp. A

Board of Pardons and Parole Revocation App. B

Order of Revocation, Judgment and Sentence App. C